

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA :
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: DECISION OF THE
vs. :
: VICE-COMMANDANT ON APPEAL
MERCHANT MARINER'S :
LICENSE No. 622115-669841 : NO. 2539
Issued to: LEVIN F. HARRISON IV:

This appeal has been taken in accordance with 46 U.S.C. Section 7702 and 46 C.F.R. Section 5.701.

By Order dated 21 December 1990, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's Merchant Mariner's License for a period of seven months (outright) upon finding proved the charge of negligence.

The specification supporting the charge alleged that, on 28 July 1990, Appellant, while serving as operator under the authority of License No. 622115, negligently left the helm of the M/V BUDDY PLAN unattended, resulting in an allision with a fixed aid to navigation, sinking said vessel and injuring passengers and crew.

The hearing was held at Baltimore, Maryland on 12 December 1990. Appellant represented himself at the hearing. The Investigating Officer offered into evidence five exhibits and

introduced the testimony of six witnesses. Appellant offered into evidence one exhibit and introduced the testimony of one witness. In addition, Appellant's Merchant Mariner's Personnel Record was marked as Judge's Exhibit No. 1.

The Administrative Law Judge's written decision and order was issued 31 January 1991, and served on Appellant on 31 January 1991. Appellant filed his notice of appeal on 20 February 1991, pursuant to 46 C.F.R. § 5.703. Following receipt of the transcript, Appellant perfected his appeal by filing a supporting appeal brief on 12 April 1991. Accordingly, this appeal is properly before the Vice-Commandant for review.

FINDINGS OF FACT

At the time of the occurrence, Appellant was serving as operator aboard the M/V BUDDY PLAN (Official Number 548171), under authority of a duly issued License, No. 622115. That license was lost on the day of the occurrence. At the time of the hearing, Appellant was the holder of License No. 669841. The license authorizes Appellant to serve as operator of small passenger vessels.

The BUDDY PLAN is a small passenger vessel, 42 feet in length, 10 feet at the beam, with a draft of four feet. It operates as a commercial charter sport-fishing vessel. On board the vessel on 28 July 1990, in addition to the Appellant, were four passengers and the First Mate. (Administrative Law Judge's Decision and Order, Finding of Fact Number 3 is incorrect in

stating that there were 2 passengers). All pertinent events occurred on that date, in the vicinity of Knapps Narrows and adjacent waters in the Chesapeake Bay.

On the morning of 28 July 1990, the M/V BUDDY PLAN departed Tilghman Island, Maryland, for fishing in the nearby waters of the Chesapeake Bay. The passengers onboard were employees of the company which had chartered the M/V BUDDY PLAN for a day of fishing.

After several hours of fishing, at approximately 11:00 a.m., the M/V BUDDY PLAN was returning to Tilghman Island via the Knapps Narrows. The weather at the time was described as clear and "overcast", and as "cloudy and overcast", although some passengers were described as "getting some sun" immediately prior to the allision. The wind was from a northerly direction, seven to fifteen miles per hour, contributing to a light chop on the Chesapeake Bay.

During the approach to and passage in the Knapps Narrows, Appellant left the helm unattended for approximately 30 seconds to one minute as he handed a knife to a passenger who was making a sandwich in the vessel's cabin. At this time the vessel was travelling at a speed of approximately 11 to 14 knots. As Appellant returned to the helm, the M/V BUDDY PLAN allided with the Knapps Narrows West Channel Light No. 1 (LLNR 23995). The allision resulted in severe damage to the bow section and forward compartment of the vessel, in which the First Mate was working at

the time of the accident, and, eventually, the sinking of the vessel M/V BUDDY PLAN. One passenger was seriously injured, requiring overnight hospitalization. The other passengers, the First Mate, and the Appellant suffered less serious injuries.

BASES OF APPEAL

On brief Appellant raises for review the issue of whether the outright suspension of seven months is clearly excessive and an abuse of discretion in that it is improperly based upon injuries and damages that resulted from the allision.

APPEARANCE; Robert J. Merriken, of Earnest & Cowdrey, 130 North Washington Street, Post Office Box 1747, Easton, Maryland.

OPINION

Sanctions imposed by an Administrative Law Judge are exclusively within his discretion unless obviously excessive or an abuse of discretion. Appeal Decision 2524 (TAYLOR), see also: Appeal Decision 2450 (FREDERICKS), affd, sub nom Commandant v. Fredericks NTSB Order ME-129, Appeal Decision 2414 (HOLLOWELL). In the case herein, the record reflects no abuse of discretion and the order is not obviously excessive.

Appellant, on brief, correctly states that the seven month suspension exceeds the suggested guidelines of Title 46 Code of Federal Regulations § 5.569. However, these suggested ranges of

orders are for information and guidance only. They are not

intended to affect the fair adjudication of each case on its individual facts and merits, 46 C.F.R § 5.569(d), thus these ranges do not represent absolute minimum and maximum periods of time. Rather they are only considered appropriate for a particular offense prior to considering matters in mitigation or aggravation. See, Appeal Decision 2391 (STUMES). Without attempting to review the assessment of the weight of the various elements of evidence in this case, I cannot conclude that the body of evidence is clearly insufficient to justify the departure from the guidelines contained in the order. The citation of other cases with similar facts and lesser orders, while persuasive, is not dispositive.

Appellant contends that it is relatively clear that the Administrative Law Judge considered the injuries suffered by one of the passengers in fashioning his order, and that such evidence cannot be properly considered an aggravating matter. While it is true that testimony such as this is not a proper matter of aggravation, I do not find that the Order is clearly and inevitably based on a consideration of this evidence, nor do I find that reference to such matters in a decision to be error.

In effect, appellant argues that, in a negligence case, the Administrative Law Judge's deliberations as to an appropriate order are restricted to consideration of evidence of a duty or obligation on the part of the respondent and evidence of a breach of this duty. With this, I agree, based on the holding in Commandant v. Wardell, NTSB Order EM-149. Evidence of damages or

injury, however, may be essential to the determination of the degree of duty a mariner owes in a given situation.

The precise degree of duty owed under a given set of circumstances is a function of several variables. These include the probability that injuries or damages will occur as the result of a certain act, the gravity of resulting injuries or damages, and the burden of taking adequate precautions to avoid the accident. Cf. Complaint of Paducah Towing Co., 692 F.2d 412 (6th Cir., 1982). Consequently, in arriving at a decision it may be inappropriate for the Administrative Law Judge to ignore and exclude from consideration the consequences and results of a negligent act.

In this case, it is clear that the Administrative Law Judge considered matters reflecting the gravity of injuries and damages, as well as considering evidence of negligent conduct. While the discussion of these matters in the Opinion may be somewhat disjointed, with references to evidence of injuries and damages both preceding and following references to evidence of negligent conduct, this does not inevitably indicate that the Order fashioned was clearly based on inappropriate considerations.

Sitting as the trier of fact, the Administrative Law Judge's duty is to evaluate the evidence presented at the hearing. See, Appeal Decision 2487 (THOMAS). It is peculiarly the Administrative Law Judge's function to hear and determine the appropriate credibility of testimony presented, to admit materials into evidence, to assign appropriate weight to each

item of evidence, and to fashion a decision based on an overall assessment of all the evidence.

See, Appeal Decision 2524 (TAYLOR), Appeal Decision 2487 (THOMAS), Appeal Decision 2450 (FREDERICKS), affd, sub nom. Commandant v. Fredericks, NTSB Order ME-129.

The Order in this case reflects consideration of the absence of prior disciplinary proceedings on the appellant's record and his cooperative manner as matters in mitigation. It also reflects consideration of matters in aggravation which include the respondent's act of leaving the wheel of a cruising vessel unattended, the vessel's speed, the restrictions of the width of the channel, the weather conditions on the morning of the allision, the fact that the object struck by the vessel was a charted, fixed, reflective channel marker, and the amount of time the respondent left the helm unattended in the context of the surrounding circumstances. Accordingly, I find that the order is supported by the record and is not an abuse of discretion, considering those matters in aggravation presented in the record.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable laws and regulations. Having reviewed the entire record and having considered the Appellant's arguments, I find the Order of the Administrative Law Judge is neither excessive nor is it an abuse of discretion.

ORDER

The Decision and Order of the Administrative Law Judge dated 31 January 1991 at Norfolk, Virginia is AFFIRMED.

//S// MARTIN H. DANIELL

MARTIN H. DANIELL

Vice Admiral, U. S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this 11th day of May 1992

HARRISON

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